RE GAN WEE KUAN,
EX P BANK BUMIPUTRA MALAYSIA BHD, (MENTAKAB)

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[BANKRUPTCY NO: 29-30-1998]
24 AUGUST 2001

BANKRUPTCY: *Adjudication order - Annulment - Whether an undischarged bankrupt may make application to annul without sanction of Official Assignee - Whether judgment debtor has locus standi - Bankruptcy Act 1967, s. 105 - Failure to comply with Form 46 of the Bankruptcy Rules 1969 - Whether caused substantial injustice to judgment creditor - Whether curable - Bankruptcy Act 1967, s. 131 - Bankruptcy Rules 1969, r. 274 - Whether there was delay in making the application to annul - Whether principle of promissory estoppel applicable - Evidence Act 1950, s. 115*

The appellant judgment creditor ('JC') had earlier obtained an adjudication order ('AO') and receiving order ('RO') against the respondent judgment debtor ('JD') on 22 July 1998. On 15 December 2000, the JD, *vide* summons-in-chambers (encl. 21) had applied to the court for annulment of the said AO and RO under s. 105 of the Bankruptcy Act 1967 ('the Act'). On 23 May 2001, the SAR had granted the said application and accordingly annulled the said AO and RO. Hence, the JC appealed against the said decision of the SAR.

The issues that arose were: (i) whether JD being an undischarged bankrupt requires prior sanction of the official assignee before making such an application as per encl. 21 as prescribed by s. 38(1)(a) of the Act; (ii) whether JD's application was irregular for failure to comply with Form 46 of the Bankruptcy Rules 1969 ('the Rules'); (iii) whether there was inordinate delay in making the said application *ie* two and a half years after the said AO and RO were made; and (iv) whether the issue of promissory estoppel was applicable.

Held:

[1] An undischarged bankrupt may make an application under s. 105 of the Act without the sanction of the official assignee as s. 38 (1) (a) of the Act had no application to an application under s. 105 of the Act. The JD has the *locus standi* to file an application under s. 105 of the Act as per encl. 21. (p 117 h-i)

[2] There was no indication that the JC was in any way prejudiced or misled by JD's failure to comply with the format set for Form 46 of the Rules. JC had not shown that substantial injustice had been occasioned as a result of the said procedure. This irregularity may be cured by s. 131 of the Act and r. 274 of the Rules. (p 119 d-e)

[3] There is nothing in the Act or the Rules to limit the time for filing any action under s. 105 of the Act. An application to annul an adjudication order under s. 105 of the Act can be made at any time by the bankrupt even after the time to appeal had expired. (p 120 c-d)

[4] There was evidence to show that before the hearing of the creditor's petition, the JC through its manager had agreed to an arrangement whereby the JD was to pay a lump sum of RM7,000 (which he did) and later by monthly instalment of RM500 with effect from May 1998 until full satisfaction of the debt; and as a consideration the JC would postpone or stay all legal proceedings against the JD in respect of the debt. (pp 120 h & 121 a)

[4a] There was a contractual relationship between the JC and the JD. The JC had indicated to the JD that it would not insist on its legal rights provided the JD complied with the scheme of payments. Such intention to create legal relations would give rise to a contract binding on the parties. The JC who gave the promises could not afterwards be allowed to revoke it and revert to its previous legal relations as if no such promises were made. (p 121 f)

[4b] Thus, the principle of "promissory estoppel" as provided under s. 115 of the Evidence Act 1950 was applicable to the JD's case in applying for an annulment under s. 105 of the Act. JC ought not to have proceeded with the bankruptcy proceeding after the promise and the undertaking were made. As such JD ought not to have been adjudged bankrupt in the first place. (pp 123 d-e & 124 c)

[Appeal dismissed; decision of SAR affirmed.]

Case(s) referred to:

Berkenaan: George Paul Daniel Arokiam, ex p United Asian Bank Bhd [1990] 2 CLJ 750; [1990] 1 CLJ (Rep) 364 ***(refd)***

Central London Property Trust Ltd v. High Tress House Ltd [1956] 1 All ER 256 ***(refd)***

Morris v. Tarrant [1971] 2 QB 143 ***(refd)***

Re Bahanudin Hj Mokhtar ex p RHB Bank And Other Appeal [2000] 1 CLJ 593 ***(refd)***

Re Khoo Kim Hock [1974] 2 MLJ 29 ***(refd)***
Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd [1990] 3 MLJ 248 ***(refd)***
Re Stranger [1883] 22 Ch D 436 ***(refd)***
S Pathmanathan v. Amaravathi & Ors [1979] 1 MLJ 38 ***(refd)***
Sarat Chunder Dey v. Gopal Chunder Laha [1892] vol 19 Indian Appeals 203 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), 105(1), (2), (5), 131
Bankruptcy Rules 1969, rr. 66, 155, 274
Evidence Act 1950, s. 115

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 457
Halsbury's Laws of India, vol 15, para 140.098, p 75

For the appellant - Lim Jit Hing; M/s Sazali & Lim
For the respondent - Bernard Poi Tzse Meng; M/s Poi Tzse Meng & Co
For the official receiver - Arif Muda

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JC:
This is an appeal by the appellant (judgment creditor) against the decision of the learned SAR made on 23 May 2001 to annul the adjudication order made against the respondent (judgment debtor) earlier. The judgment creditor (JC) has obtained an adjudication order (AO) and receiving order (RO) against the judgment debtor (JD) on 22 July 1998. On 15 December 2000, the JD, *vide* summon-in-chambers (encl. 21) has applied to the court for annulment of the said adjudication order as well as the receiving order under s. 105 of the Bankruptcy Act 1967. On 23 May 2001 the learned SAR has granted the said application and accordingly, annulled the said adjudication order as well as the receiving order. The JC is now appealing against the said decision of the learned SAR to the judge-in-chambers.

Grounds Of The Appeal
The grounds of the appeal are as follows:

i) that the JD's application (encl. 21) was irregular for failure to camply with Form 46 of the Bankruptcy Rules 1969;

ii) that there was inordinate delay in making the said application ie, 2 1/2 years after the AO and RO were made;

iii) that the doctrine of "promissory estoppel" as argued by the JD before the learned SAR, was not applicable to the said application; and

iv) that there were already two (2) "proofs of debts' filed by two (2) other judgment creditors with the official assignee, against the judgment debtor after the said AO and RO were made.

Brief Facts

The JD was (and is still) indebted to the JC *vide* Court Order dated 8 November 1996 in the sum of RM16,948.54. The JD, knowing of his liability for the judgment debt commenced making payment to the JC as early as March 1996. From the bank statements exhibited in pp. 28-55 of encl. 21, the period for such payment ran from March 1996 till April 1998. The JC then commenced bankruptcy proceedings against the JD. It has first issued a bankruptcy notice dated 13 February 1998 against the JD. This notice was not challenged by the JD. As a result thereof, the JC then issued a creditor's petition against the JD on 17 April 1998. On the face of these proceedings, the JD continued to make payment as said earlier without fail. In order that he may be granted the indulgence to pay what he owed in periodic payments as was before, the JD approached and spoke to the bank's manager, Haji Sawal bin Hj. Chekun @ Mohamad bin Jekon. The meeting between then was held on 12 May 1998 at the bank's premises. This meeting was crucial to the JD's case. It was at this meeting that the JD agreed to the proposals laid down by the JC. The JC wanted the JD to pay a lump sum of RM7,000 immediately and to pay a sum of RM500 per month to the JC beginning May 1998 until full settlement. The terms proposed by the JC through its manager, were acceptable to the JD. A5 a result of the said arrangement, the JC has agreed to postpone all legal proceedings in respect of the debts against the JD. The JC has intended to suspend **all** legal proceedings if the JD adheres faithfully to the arrangements made on 12 May 1998. From the bank statements exhibited in pp. 56 to 63 of encl. 21, it seems that the JD has kept to his side of the bargain and regularly made payments of RM500 every month without fail from May 1998 through November 1998. In instances where the JC did not issue bank statements, the JD has exhibited 'paying-in-slips' for the months of September 1998 till November 1998. These 'paying-in-slips' were franked by the JC indicating receipt of same (as exhibited in pp. 61 to 63 of encl. 21).

The JC then on 12 May 1998, informed its solicitors about the arrangement and instructed them to postpone the legal proceedings on the ground that the JD has "paid RM7,000 today and promised to pay RM500 monthly". The JD then contacted the said solicitors for the JC and was told "not to

come to court". The JD was clearly under the impression that the matter against him was stayed and continued to make payment of RM500 per month to the JC.

In October 1998, the JD experienced a rude shock when he received a letter from the official assignee dated 30 October 1998 informing him that an AO and RO were entered against him on 22 July 1998 by the JC. As requested by the official assignee, the JD went to the AO's office in Kuantan on 25 November 1998. The JD explained to the official assignee that he was not aware of the hearing of the creditor's petition and that an agreement or arrangement has been made with the JC to make periodical payments before the hearing of the creditor's petition. Upon hearing that he was adjudged bankrupt, JD then stopped making the monthly payments to the JC. On 30 December 1998, after confirmation of the bankruptcy orders, the JD wrote to the official assignee explaining the circumstances and copied the said letter to the JC and its solicitors. There was no response from all quarters to this letter. It was under such circumstances, the JD has to come to the court to make application for annulment of the AO and RO under s. 105 of the Bankruptcy Act 1967.

Whether A Sanction Is Required

The first issue raised during submissions, was on the *locus standi* of the JD ie, – whether, being an undischarged bankrupt, the JD requires prior sanction of the official assignee before making such an application as per encl. 21, as prescribed by s. 38(1)(a) of the Bankruptcy Act 1967, which provides:

> 38(1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other then an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

The question whether the prohibition prescribed by s. 38(1)(a) applies to an invocation of s. 105(1) of the same Act, was fully discussed by Mohamed Azmi J (as he then was) in *Re Khoo Kim Hock* [1974] 2 MLJ 29 and was followed by VC George J in *Re Sebastian, ex p Metroplex Leasing & Credit Corp. Sdn Bhd* [1990] 3 MLJ 248. In both cases, it was held that an undischarged bankrupt may make an application under s. 105 of the same Act, without the sanction of the official assignee as s. 38(1)(a) of the Act had no application to an application under s. 105 of the Act. With respect I would follow the decision and find that the JD in the present case, can, or has a *locus standi*, to file on application under s. 105 of the Act as per encl. 21 without having to obtain prior sanction of the official assignee.

Failure To Comply With Form 46 Of The Bankruptcy Regulations 1969

The JC submitted that the JD in applying for annulment of the AO and RO (*vide* encl. 21), has failed to comply with the format set for Form 46 of the Bankruptcy Rules 1969. The relevant rules say that all application under s. 105 of the Bankruptcy Act 1967 shall be made by using Form 46. The JC also submitted that this requirement is mandatory under r. 155 of the same 1969 Rules. The JD, on the other hand, argued that, in view of the amount of documentary evidence that need to be exhibited for the benefit of the court, the procedure used therein ie, summons-in-chambers would be most appropriate. The JC also argued that the JC was in no way prejudiced or misled by the procedure.

To understand the issue better, it is advisable to see what is Form 46 itself. Form 46 is a requirement under r. 155 of the Bankruptcy Rules 1969 and reproduced below:

No. 46
(Kaedah 155)
(Tajuk)

PERMINTAAN MEMBATALKAN PENGHUKUMAN
DI BAWAH SEKSYEN 105

Saya ... yang beralamat di ... , sebagai yang berkepentingan dalam perkara ini, adalah dengan ini membuat permintaan-permintaan kepada Mahkamah supaya perintah penghukuman terhadap ... dibatalkan (di sini dinyatakan alasan permintaan).

Bertarikh pada ... haribulan ... 19 ...

...
Tandatangan.

The procedure or format adopted by the JD in making an application under s. 105 of the Act (*vide* encl. 21) is reproduced below:

(Tajuk Kes)

SAMAN DALAM KAMAR

Benarkan semua pihak yang berkenaan hadir di hadapan Hakim/Pendaftar Dalam Kamar pada hari pada tarikh ..., pukul ... pagi/petang mendengarkan permohonan dipihak ... untuk perintah-perintah seperti berikut:

1) Satu perintah bahawa perintah penghukuman bertarikh 22.7.1998 dibatalkan menurut seksyen 105 Akta Kebangkrapan 1967;

2) Kos.

Alasan-alasan membuat permohonan adalah:

a) ...

b) ...

Bertarikh pada ... haribulan ... , 2001.

...
Pendaftar

The said summons-in-chambers (encl. 21) was supported by an affidavit sworn by the JD on 14 December 2000, where numerous documents were exhibited to it.

Looking at both the formats above, I agree that they are different from one to another. However, the basic relevant substance is the same – ie, the name of the applicant, application to annual an adjudication order, the grounds of the application and the date of the application. There is also no indication that the JC was in any way prejudiced or misled by the procedure. That JC has also not shown that substantial injustice has been occasioned as a result of that procedure. I am of the view that this irregularity may be cured by s. 131 the Bankruptcy Act 1967 and r. 274 of the Bankruptcy Rules 1969.

Under s. 131, it is provided that "no proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court".

Further, r. 274 of the Bankruptcy Rules 1969 provides that "non-compliance with the Rules shall not render any proceeding void unless the court shall so direct but such proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the court may think fit".

From these provisions, the court has a discretionary power to validate any proceedings which is not in conformity with the Rules, after being satisfied that no substantial injustice has been caused to the JC.

Section 105 Of The Bankruptcy Act 1967

The JD's application *vide* encl. 21 was made under s. 105(1) of the Bankruptcy Act 1967 which provides, *inter alia*, that the court may annul the adjudication order, where in the opinion of the court a debtor "ought not to have been adjudged bankrupt". As provided under s. 105(5) of the Act, when the court annuls an adjudication order under the section, it shall

also rescind the receiving order. In appealing against the decision of the learned SAR to annul the adjudication order, the JC must be able to satisfactorily convince this court that the learned SAR was wrong either in law or fact in exercising his discretion under s. 105 of the Act; failing which, this court, in exercising its appellate jurisdiction, ought not to interfere or disturb the said decision of the learned SAR.

Delay In Filing JD's Application

The JC submitted that there was inordinate delay of 2 1/2 years for the JD's application under s. 105 of the Act as per encl. 21 and it was far beyond the time prescribed for appeal and the delay is not excusable. This issue was not raised before the learned SAR. I am of the view that there is nothing in the Bankruptcy Act 1967 or the Bankruptcy Rules 1969 to limit the time for filing any action under s. 105 of the Act. Thus, my conclusion is that an application to annul an adjudication order under s. 105 of the Act can be made at any time by the bankrupt even after the time to appeal had expired. My view is supported by Zakaria M. Yatim J in *Berkenaan: George Paul Daniel a/l Arokiam, Ex parte: United Asian Bank Bhd.* [1990] 2 CLJ 750; [1990] 1 CLJ (Rep) 364 when he said:

> Permohonan untuk mengenepikan atau membatalkan perintah penerimaan dan penghukuman boleh dibuat oleh orang-orang bankrap pada bila-bila masa sahaja dan tidak ada masa yang dihadkan untuk beliau membuat permohonan tersebut.

In *Khoo Kim Hock*'s case *(supra)* the application under s. 105 of the Act was made to and entertained by the court, well after the time to appeal had expired. It is also settled that s. 105(1) of the Act may be invoked even after the time to appeal had lapsed. – (see: *Halsbury's Laws of England* (4th edn), para. 457 and the decision of the English Court of Appeal in *Re Stranger* [1883] 22 Ch. D 436) where Cotton LJ said:

> No doubt, the twenty-one days, have expired within which, under ordinary circumstances, the adjudication might have been questioned by means of an appeal; but the court has undoubtedly power, if it thinks the parties have made a proper case, to allow the guestion to be raised after that time. That was expressly decided by the Court of Appeal in *Ex Parte Tucker* [1879] 12 Ch. D 308.

Issue Of "Promissory Estoppel

The issue of "promissory estoppel' was raised by the JD before the learned SAR as well as before me in this appeal. The JD contended that the doctrine of "promissory estoppel" is applicable in this case as there was evidence to show that before the hearing of the creditor's petition, the JC, through its manager has agreed to an arrangement whereby the JD was to

pay a lump sum of RM7,000 (which he did) and later by monthly instalment of RM500 with effect from May 1998 until full satisfaction of the debt; and as a consideration, the JC would postpone or stay all legal proceedings against the JD in respect of the debt. Based on that arrangement, the JD has faithfully fulfilled his obligation as agreed. The JC on the other hand, argued that the said doctrine of "promissory estoppel" is not applicable to the present proceeding.

The issue of "promissory estoppel" is governed by s. 115 of the Evidence Act 1950, which reads as follows:

> 115. When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative interest to deny the truth of that thing.

In order that this principle of law to apply there must be a contractual relationship between the parties. In *Morris v. Tarrant* [1971] 2 QB 143 it was established that the principle of promissory estoppel does not apply to cases where there is no contractual relationship between the parties in a suit. This principle was followed by our Malaysian Court in *S. Pathmanathan v. Amaravathi & Ors.* [1979] 1 MLJ 38.

In our present case, there was obviously contractual relationship between the JC and the JD, both in respect of the debt as well as the promise or arrangement made between the JC's manager and the JD on 12 May 1998. The JD's evidence in his affidavit affirmed on 14 December 2000 on this matter has not been challenged by the JC. This was further supported by a letter dated 12 May 1998 from the JC to its solicitors (exh. "GWK4" to encl. 21) which reads:

> Our ref: MTKB/HSHJ/AFO/JGA 6-75
> 12th May 1998
>
> Salazi & Lim
> No. 4-A, Jalan Anggerik
> 28400 Mentakab
> Pahang Darul Makmur.
>
> URGENT
> FAX NO: 09-2782113
>
> Sir,
>
> **LEGAL ACTION**
> **AGAINST: GAN WEE KUAN**
>
> The above matter refers.

Kindly be informed that the abovestated customer paid for RM7,000.00 today and promised to pay RM500.00 monthly.

You are hereby instructed to postpone the legal proceeding.

Thank you.

Yours faithfully,
for BANK BUMIPUTPA MALAYSIA BERHAD MENTAKAB

Sgd

...
(HAJI SAWAL BIN HAJI JEKOM)
Manager

The above letter from the JC was in response to the JD's letter (of the same date) earlier sent to the JC, which reads as follows:

GAN WEE KWAN,
B. 115, Taman Bahagia,
28000 Temerloh

Date: 12/5/98

The Manager
Bank Bumiputra (M) Bhd
No. 46-47, Jalan Temerloh
28400 Mentakab.
(Attn: Tuan Hj. Sawal bin Hj. Jekom)

Re: Letter Of Undertaking
Account No: JG 06-165-0006-75

In consideration of your agreeing to accept the sum of RM7,000.00 being first payment and to withhold any legal proceedings in respect of the account abovementioned, I hereby undertake to pay the sum of RM500.00 every month to your good establishment in settlement of the outstanding balance, with effect from June 1998 until full and final settlement.

In the event of happening of default, your good establishment shall proceed with whatever legal action you may deem fit against myself and all cost incurred shall be borne by myself.

Thank you.

Yours faithfully

(Sgd)

...
(GAN WEE KUAN)

By virtue of the said s. 115 of the Evidence Act 1950, the undertaking given by the JD to the JC to pay the judgment sum in the manner agreed and the JC has represented that it will not proceed with legal proceedings against the JD constituted a representation within the meaning of the said section.

In *Sarat Chunder Dey v. Gopal Chunder Laha* [1892] Vol. 19 Indian Appeals 203 (a Privy Council's case), Lord Shand said (at p. 215):

> What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.

The parties when they met on 12 May 1998 agreed to a scheme of payments and were intended to create legal relations. The JC has indicated to the JD that it would not insist on its strict legal rights provided the JD complies with the scheme of payments. Such intention to create legal relations would give rise to a contract binding on the parties. The JC who gave the promises cannot afterwards be allowed to revoke it and revert to its previous legal relations as if no such promises were made.

Halsbury's Laws of India, vol. 15, para. 140.098, at p. 75, states:

> When one party, by his words or conduct, has given a clear and unequivocal promise or assurance to the other, intending to effect legal relations between them and to be acted on accordingly, then, it suffices that the other party has taken him at his words and acted on it. The one who gave the promise or assurance cannot after words be allowed to revoke if or revert to their previous legal relations as if he had made no such promise or assurance. He must accept their legal relations subject to the qualification which he has introduced.

The JC has indicated to the JD that they would not enforce its strict legal rights provided the terms of the arrangement are adhered to by the JD and once the JD has carried out his undertaking, the JC is bound in equity as well as in law, to suspend its strict legal rights, in *Central London Property Trust Ltd. v. High Tress House Ltd.* [1956] 1 All ER 256, Lord Denning said at p. 258:

> They are cases of promise which are intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the Court have said these promises must be honoured. ... The Courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them.

So, in our present proceeding, I am convinced that the principle of "promissory estoppel" as provided under s. 115 of the Evidence Act 1950 and established by the above authorities, is applicable to the JD's case in applying for on annulment under s. 105 of the Bankruptcy Act 1967. On that ground alone, I am of the opinion that the JC ought not to have proceeded with the bankruptcy proceeding after the promise and the undertaking were made. As such the JD ought not to have been adjudged bankrupt in the first place.

In submitting that "promissory estoppel" does not apply in this case, the JC cited *Re Bahanudin Hj. Mokhtar, Ex parte RHB Bank and Other Appeal* [2000] 1 CLJ 593 as an authority for his proposition. In that case, the High Court in Kota Bharu has remarked that: "In the circumstances, I find that the doctrine of estoppel by conduct relied upon by counsel for the JD has no application in this regard".

It must be emphasised that whether the principle of "promissory estoppel" or "estoppel by conduct" is applicable or not to a particular case depends very much on the facts of each case. Facts may differ from one case to another. Thus a finding of fact in one particular case may not be applicable to another case, particularly when the facts are different. The said *Bahanudin*'s case can be distinguished from the present case on the following grounds:

i) there is no *ratio decidendi* on the question of "promissory estoppel" in that case. The remarks were made as an observation and are things said by the way of and qualifies as *obiter dictum.*

ii) in that case, "promissory estoppel" was raised because the counsel for the JC has on previous occasions conceded to requests for adjournment by counsel for the JD. Based on these facts, counsel for the JD contended that the JC (by conceding to adjournments) was estopped from applying for the adjudication order and the receiving order as there is a pending suit involved. Also the words "in the circumstances" at the beginning of the remarks means that the dictum should not be applied generally but only in the like "circumstances".

iii) that in our present case, the AO and RO were taken against the JD without his knowledge.

The Deposition Of The JC's Manager

In his affidavit-in-reply affirmed by the manager of the JC, Haji Sawal bin Haji Chekun @ Mohamad bin Jekon, on 27 February 2001, (at para. 6), the said Haji Sawal disposed that although according the terms of the arrangement, the JD has paid RM7000 but the JD has failed to pay the monthly instalment on the dates proposed and that the JD paid the instalment only on 13 November 1998 and 12 December 1998. This is not true unless the bank statements and the paying slips (which were duly franked by the JC) are forgeries. The bank statements and paying slips as exhibited at pp. 56-63 of the JD's affidavit (which have not been challenged at all by the JC) clearly show that all the monthly instalments of RM500 per month were religiously made by the JD in accordance with the terms of the arrangement between them. All these documents were issued by the JC in it's ordinary banking transactions.

In para. 6 of his affidavit-in-support of the application under s. 105 of the Bankruptcy Act 1967, the JD deposed that: "I then contacted Tetuan Sazali & Lim regarding the proceedings and Encik Lim Jit Hing told me not to come to court". In reply to this deposition the said Hj. Sawal (manager of the JC) replied, in para. 7 of his affidavit-in-reply, (encl. 25) that: "Mengenai dakwaan penghutang penghakiman dalam perenggan 6 afidavitnya yang menyatakan beliau ada berjumpa dengan peguam Bank, Dato' Lim di mana kononnya Dato' Lim telah memberitahunya supaya tidak hadir ke mahkamah, ini juga tidak benar". With respect, I am not able to accept this reply. This deposition is hearsay and not admissible. The only person who can deny or affirm about the matter is Dato' Lim personally, not the JC's manager. Since there is no effective denial on this issue by Dato' Lim personally, then the JD's deposition in para. 6 of his affidavit-in-support of the application is deemed to be true and admissible.

The Effect On Proof Of Debts

Finally, the JC raised another issue ie, after the JD was declared bankrupt, there were two other judgment creditors who have filed their proof of debts against the JD with the official assignee. The JC submitted that if the appeal by the JC in this case is dismissed, then the proof of debts have to be returned to both the creditors. I think this issue is not relevant for consideration in exercising the power s. 105 of the Act. It has no impact on the decision to annul the AO under that section. This result must have been anticipated in s. 105 itself. Section 105(5) clearly provides that when the court annuls an adjudication under this section it shall also rescind the

receiving order. While s. 105(2) provides that "where an adjudication is annulled under this section, all sales and depositions of property, and payments duly made, and all acts thereto for done by the official assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints or in default of any such appointment revert to the debtor for all his estate or interest there in on such terms and subject to such conditions, if any, as the court declares by order".

Service Of Bankruptcy Notice And Creditor's Petition On Sunday

I have also observed in this proceeding that both the bankruptcy notice and creditor's petition were served on the JD on Sunday, which is a weekly holiday (see: paras. 3 and 4 of the JD's affidavit-in-support of the application). The affidavit of service affirmed by a clerk attached to the JC's solicitors firm (exh. "GWK2" – at p. 16 of encl. 21) clearly confirm this fact. Even though this issue was not submitted by either party to this proceeding, it is my observation that such service of the said documents contravenes r. 66 of the Bankruptcy Rules 1969.

Conclusion

For the above reasons I am satisfied that the learned SAR has rightly decided that, in the circumstances of this case, the JC ought not to have proceeded with the bankruptcy proceedings against the JD and that the JD ought not to have been adjudged bankrupt. On that premise the learned SAR was right in making an order for annulment of the AO and RO under s. 105 of the Bankruptcy Act 1967. Therefore, the appeal by the JC is hereby dismissed with costs and the decision of the learned SAR dated 23 May 2001 is affirmed.